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No. _____

In The

Supreme Court of the United States

TUCOEMAS FEDERAL CREDIT UNION
and LINDA REESE,

Petitioners,

vs.

KIMBERLY McGEE,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of California, Fifth Appellate District

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Federal credit unions are federal instrumentalities chartered under the Federal Credit Union Act, 12 U.S.C. §§ 1751 to 1795k. Does their authority under that Act to "sue and be sued," 12 U.S.C. § 1757(2), waive their immunity as federal instrumentalities from punitive damage claims? The decision of the Court of Appeal of the State of California, which allowed the punitive damage claims here, declined to follow decisions of the Sixth, Eighth, Ninth, and Eleventh Circuits of the United States Court of Appeals.

PARTIES TO THE PROCEEDINGS

All parties are listed in the caption.

RULE 29.6 STATEMENT

Petitioner Tucoemas Federal Credit Union is a federal credit union organized in accordance with the provisions of the Federal Credit Union Act, 12 U.S.C. §§ 1751 to 1795k. It has no parent corporation. Further, no publicly held company owns 10% or more of an interest or share of stock in petitioner.

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PETITION FOR A WRIT OF CERTIORARI

Tucoemas Federal Credit Union and Linda Reese respectfully petition for a writ of certiorari to review the judgment of the Court of Appeal of the State of California, Fifth Appellate District, in this case.

OPINIONS BELOW

The August 2, 2007 opinion of the Court of Appeal of the State of California, Fifth Appellate District, is reported at 63 Cal. Rptr. 3d 808, 153 Cal. App. 4th 1351 (Ct. App. 2007) and reproduced in the appendix hereto at App. 1-16. The October 26, 2004 order of the Superior Court of the State of California, County of Tulare, on defendants Tucoemas Federal Credit Union's and Linda Reese's demurrer and motion to strike plaintiff Kimberly McGee's first amended complaint is unreported and reproduced at App. 17-19. The October 6, 2005 judgment of the Superior Court is unreported and reproduced at App. 20-26. The November 23, 2005 order of the Superior Court denying defendants' motion for judgment notwithstanding the verdict as to punitive damages is unreported and reproduced at App. 27-33. The September 4, 2007 order of the Court of Appeal denying defendants' petition for rehearing is unreported and reproduced at App. 34. The November 14, 2007 order of the Supreme Court of the State of California denying defendants' petition for review is unreported and reproduced at App. 35.

JURISDICTION

The judgment of the Court of Appeal was entered on August 2, 2007. App. 1. On September 4, 2007, the Court of Appeal denied defendants' timely petition for rehearing. App. 34. On November 14, 2007, the Supreme Court of California denied defendants' timely petition for review. App. 35. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

STATUTES INVOLVED

Section 107 of the Federal Credit Union Act, 12 U.S.C. § 1757, provides in relevant part as follows:

> A Federal credit union . . . shall have power –
>
> . . . .
>
> (2) to sue and be sued . . . .

Additional provisions of the Federal Credit Union Act, Federal Tort Claims Act, and Internal Revenue Code are set forth at App. 36-44.

STATEMENT OF THE CASE

Background.

Plaintiff Kimberly McGee sued defendant Tucoemas Federal Credit Union and its chief executive officer, defendant Linda Reese, alleging employment

discrimination claims and seeking both compensatory and punitive damages.

Defendants moved to strike plaintiff's punitive damage claims on the grounds that the Credit Union was a federal instrumentality immune from punitive damages and that the allegations against Ms. Reese were based on her acts as the Credit Union's chief executive officer. The Superior Court denied the motion. App. 17-19.

The action was tried to a jury, which returned a verdict in favor of plaintiff. App. 20-24. In addition to awarding plaintiff compensatory damages, the jury awarded her punitive damages of $1.2 million against the Credit Union and $7 thousand against Ms. Reese. App. 24-26.[1]

Defendants moved for judgment in their favor notwithstanding the verdict on the punitive damage claims, again asserting their immunity from punitive damages. The Superior Court denied the motion. App. 27-33.[2]

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[1] The jury awarded plaintiff compensatory damages against the Credit Union of $2,041,558. App. 24. After applying an offset for a prior payment, the total compensatory damage award was $1,990,384.56. App. 25-26.

[2] Defendants also moved for a new trial on the ground of excessive compensatory damages. The Superior Court conditionally granted this motion unless plaintiff accepted a reduction of the compensatory damage award by $750,000. Plaintiff accepted the reduction.

Defendants appealed, challenging only the awards of punitive damages. Defendants again argued the Credit Union was a federal instrumentality immune from punitive damage claims.

The Decision of the Court of Appeal.

The Court of Appeal affirmed the judgment. *McGee v. Tucoemas Fed. Credit Union*, 63 Cal. Rptr. 3d 808, 153 Cal. App. 4th 1351 (Ct. App. 2007); App. 1-16. It assumed for purposes of its opinion that the Credit Union was a federal instrumentality because "federal credit unions have been judicially found to be, as a general matter, federal instrumentalities . . . ." App. 7. However, the Court of Appeal held that the Credit Union's authority to "sue and be sued" waived its immunity from punitive damage claims. App. 4-13.

The Court of Appeal declined to follow a line of contrary authority by the Sixth, Eighth, Ninth, and Eleventh Circuits holding that the authority of federal instrumentalities to "sue and be sued" does not waive their immunity from punitive damage claims. App. 8, citing *Commerce Fed. Sav. Bank v. FDIC*, 872 F.2d 1240, 1247-48 (6th Cir. 1989); *Smith v. Russellville Prod. Credit Ass'n*, 777 F.2d 1544, 1549-50 (11th Cir. 1985); *Rohweder v. Aberdeen Prod. Credit Ass'n*, 765 F.2d 109, 113 (8th Cir. 1985); *Matter of Sparkman*, 703 F.2d 1097, 1100-01 (9th Cir. 1983).

The Court of Appeal held these decisions had been impliedly overruled by this Court's decision in *FDIC v. Meyer*, 510 U.S. 471 (1994), which states

broadly that "agencies 'authorized to "sue and be sued" are presumed to have fully waived immunity.'" *Id.* at 481; *see* App. 9-10. The Court of Appeal held there was no reason to depart from this presumption of full waiver here because the punitive damage awards against the Credit Union and Ms. Reese would not be paid by taxpayers and there was no evidence that the awards would affect the Credit Union's ability to make loans to its members. App. 11-12.

The Court of Appeal also distinguished the line of contrary Court of Appeals decisions on the ground that many of those decisions involved production credit associations in which the federal government purportedly "had a proprietary interest." App. 8-9.

Defendants timely petitioned the Court of Appeal for rehearing. Their petition was denied on September 4, 2007. App. 34. Defendants timely petitioned the Supreme Court of California for review of the Court of Appeal's decision. Their petition was denied on November 14, 2007. App. 35.

REASONS FOR GRANTING THE PETITION

I. The Court of Appeal has decided an important and recurring issue of the punitive damages immunity of federal instrumentalities in a manner conflicting with decisions of the Sixth, Eighth, Ninth, and Eleventh Circuits.

Federal credit unions are federal instrumentalities chartered under the Federal Credit Union Act and, like most federal instrumentalities, have statutory authority to "sue and be sued." 12 U.S.C. § 1757(2). The Court of Appeal below held that this authority waived the Credit Union's sovereign immunity from plaintiff's punitive damage claims. App. 4-10.

The Court of Appeal's construction of the "sue and be sued" clause conflicts with five United States Court of Appeals decisions holding that the authority to "sue and be sued" of federal instrumentalities does *not* waive their immunity from punitive damage claims. *Springer v. Bryant,* 897 F.2d 1085, 1089 (11th Cir. 1990); *Commerce Fed. Sav. Bank v. FDIC*, 872 F.2d 1240, 1247-48 (6th Cir. 1989); *Smith v. Russellville Prod. Credit Ass'n*, 777 F.2d 1544, 1549-50 (11th Cir. 1985); *Rohweder v. Aberdeen Prod. Credit Ass'n*, 765 F.2d 109, 113 (8th Cir. 1985); *Matter of Sparkman*, 703 F.2d 1097, 1100-01 (9th Cir. 1983).

Of these five contrary decisions, the lead is *Matter of Sparkman*, in which the Ninth Circuit relied on "the long-established principle that the

United States, its agencies, and instrumentalities cannot be held liable for punitive damages unless there is express statutory authorization for such liability." 703 F.2d at 1100. Based on this principle, "[a] federal instrumentality . . . retains its immunity from punitive damages unless Congress *explicitly* authorizes liability for such damages." *Id.* at 1101 (original emphasis). The Ninth Circuit thus held that while the "sue and be sued" clause in the enabling legislation for the federal instrumentality at issue in that case, a production credit association, "waives sovereign immunity from ordinary lawsuits, it does not subject production credit associations to liability for punitive damages. Such immunity must be waived expressly." *Id.*

The Court of Appeal below recognized that its decision conflicted with *Matter of Sparkman* and its progeny. App. 8. However, the Court of Appeal held that those decisions had been impliedly overruled by this Court in *FDIC v. Meyer*, 510 U.S. 471, 481 (1994). App. 9-10 ("the *Sparkman* analysis is inconsistent with subsequent United States Supreme Court authority").

In reaching this conclusion, the Court of Appeal relied on this Court's statement in *FDIC v. Meyer* that courts "'liberally construe the sue-and-be-sued clause'" and will presume that a federal instrumentality's liability "'*is the same as that of any other business.*'" 510 U.S. at 481 (original emphasis). The Court of Appeal held: "In *Sparkman*, the Ninth Circuit concluded that a federal instrumentality

subject to a '"sue and be sued"' clause retains its immunity from punitive damages unless Congress *explicitly* authorizes liability for such damages. (*Matter of Sparkman, supra*, 703 F.2d at p. 1101.) However, the Supreme Court set forth a contrary analytical framework in *FDIC v. Meyer*, *supra*, 510 U.S. 471 . . . ." App. 9 (original emphasis).

The issue the Court of Appeal identified below is unsettled. Although this Court in *FDIC v. Meyer* stated broadly that the liability of a federal instrumentality with authority to sue and be sued is the same as that of any other business, 510 U.S. at 481, this Court did so without addressing the issue here of liability for punitive damages, *see id.* at 480-83.

Moreover, this unsettled question is of widespread importance because of the ubiquitous presence of the sue and be sued clause in the charters of federal instrumentalities. As early as 1939, this Court noted that Congress had "provided for not less than forty . . . corporations discharging governmental functions, and without exception the authority to-sue-and-be-sued was included." *Keifer & Keifer v. Reconst. Fin. Corp.*, 306 U.S. 381, 390 (1939). Federal instrumentalities with authority to sue and be sued include the American National Red Cross (36 U.S.C. § 300105(a)(5)), the Federal Deposit Insurance Corporation (12 U.S.C. § 1819(a)), the Tennessee Valley Authority (16 U.S.C. § 831c(b)), and the United States Postal Service (39 U.S.C. § 401(1)).

Review is thus necessary to resolve the conflict regarding whether the sue and be sued clause waives the punitive damages immunity of federal instrumentalities. The conflict is important to the numerous federal instrumentalities that Congress has created with authority to sue and be sued. The conflict is also important to the many citizens who benefit from the governmental purposes these federal instrumentalities fulfill. Further, because the conflict results from language in this Court's decisions, resolution can come only from this Court.

II. This Court's seven prior decisions examining the effect of the sue and be sued clause leave open the important issue here of the effect of that clause on the punitive damages immunity of federal instrumentalities.

This Court has on at least seven occasions addressed the effect of the sue and be sued clause on the sovereign immunity of federal instrumentalities, but never addressed whether that clause waives their immunity from punitive damage claims. *See U.S. Postal Serv. v. Flamingo Indus.*, 540 U.S. 736, 744 (2004) (a federal instrumentality with authority to sue and be sued is "amenable to suit, as well as to the incidents of judicial process" under the federal antitrust laws); *FDIC v. Meyer*, 510 U.S. at 480-83 (a federal instrumentality with authority to sue and be sued is subject to suit for a constitutional tort); *Loeffler v. Frank*, 486 U.S. 549, 554-56 (1988) (a federal

instrumentality with authority to sue and be sued can be liable for prejudgment interest); *Franchise Tax Bd. of Cal. v. U.S. Postal Serv.*, 467 U.S. 512, 520-21 & n.14 (1984) (a federal instrumentality with authority to sue and be sued can be required to honor an administrative order to withhold state income tax delinquencies from its employees' wages); *Reconst. Fin. Corp. v. J. G. Menihan Corp.*, 312 U.S. 81, 85-86 (1941) (a federal instrumentality with authority to sue and be sued can be liable for litigation costs); *Fed. Hous. Admin., Region No. 4 v. Burr*, 309 U.S. 242, 245-46 (1940) (a federal instrumentality with authority to sue and be sued can be required to honor state court garnishment orders); *Keifer & Keifer*, 306 U.S. at 394-97 (a federal instrumentality with authority to sue and be sued is subject to suit for tort claims).

As these seven decisions show, this Court has repeatedly viewed conflicts regarding the construction of the sue and be sued clause to be important and to support a grant of certiorari. Certiorari should be granted now to decide the issue this Court has left open: the effect of that clause on punitive damage claims against federal instrumentalities.

III. The decision below is incorrect.

A. Federal credit unions are federal instrumentalities serving the important governmental purpose of extending credit to persons of modest means.

The courts have repeatedly held federal credit unions to be federal instrumentalities. *Cal. Credit Union League v. City of Anaheim,* 95 F.3d 30, 31 (9th Cir. 1996) ("courts have generally considered federal credit unions to be instrumentalities of the federal government . . . "); *T I Fed. Credit Union v. DelBonis,* 72 F.3d 921, 935 (1st Cir. 1995) ("We think it plain that federal credit unions are, as a general matter, federal instrumentalities"); *United States v. Michigan,* 851 F.2d 803, 807 (6th Cir. 1988) ("we hold that federal credit unions are federal instrumentalities"). Consistent with these decisions, the Court of Appeal acknowledged the Credit Union to be a federal instrumentality. App. 7.

Federal credit unions are federal instrumentalities in part because they were created by Congress to serve an important governmental purpose. *T I Fed. Credit Union,* 72 F.3d at 931-32. During the Depression, Congress recognized that "[t]he consumer-credit problem is a national problem . . . [that] calls for prompt solution because, unsolved, it greatly retards the recovery program." S. Rep. No. 555, 73d Cong., 2d Sess., at 4 (1934). To remedy this national problem, Congress created federal credit unions by passing the Federal Credit Union Act of 1934. *See* 12 U.S.C. §§ 1751-1795k.

Federal credit unions were intended to remedy the national credit problem and help end the Depression by "mak[ing] more available to people of small means credit for provident purposes." S. Rep. No. 555, 73d Cong., 2d Sess., at 1; *see also* H.R. Rep. No. 2021, 73d Cong., 2d Sess., at 1 (1934); *accord*, *T I Fed. Credit Union*, 72 F.3d at 931. Federal credit unions furthered these ends because they were cooperative associations chartered under federal law "for the purpose of promoting thrift among [their] members and creating a source of credit for provident or productive purposes." 12 U.S.C. § 1752(1); *see* 12 U.S.C. § 1757(5).

Federal credit unions are also recognized as federal instrumentalities because they are subject to extensive government control. *T I Fed. Credit Union*, 72 F.3d at 934. Federal credit unions owe their very existence to an Act of Congress. 12 U.S.C. §§ 1751-1795k. Under that Act, federal credit unions must be member-owned, 12 U.S.C. §§ 1759, 1761, and can serve only a defined membership, 12 U.S.C. § 1759. *See Branch Bank & Trust v. Nat'l Credit Union Admin. Bd.*, 786 F.2d 621, 625-26 (4th Cir. 1986). Further, federal credit unions must be available to act as public depositories and fiscal agents for the United States. 12 U.S.C. § 1767(a).

Federal credit unions are supervised by the National Credit Union Administration (NCUA). 12 U.S.C. §§ 1752a, 1756, 1766(a). The NCUA approves each federal credit union's charter and bylaws. 12 U.S.C. §§ 1754, 1758. The NCUA can also place a

federal credit union in involuntary liquidation or revoke its charter. 12 U.S.C. § 1766(b)(1).

In addition, federal credit unions are recognized as federal instrumentalities in part because they are exempt from federal, state, and local taxes, 12 U.S.C. § 1768, and their exemption from federal taxes arises because of their federal instrumentality status, *T I Fed. Credit Union*, 72 F.3d at 933-34. Federal credit unions are exempt from federal taxes under 26 United States Code section 501(c)(1)(A)(i) governing "an *instrumentality* of the United States." Emphasis added; *see* Rev. Rul. 60-169, 1960-1 C.B. 621 ("Federal Credit Unions organized and operated in accordance with the Federal Credit Union Act are recognized as *instrumentalities* of the United States within the meaning of section 501(c)(1) of the Code.") (emphasis added), declared obsolete on other grounds by Rev. Rul. 89-94, 1989-2 C.B. 233 ("Federal credit unions are . . . described in section 501(c)(1)").

Moreover, federal credit unions continue to act as federal instrumentalities. In 1998, Congress observed that federal credit unions "unlike many other participants in the financial services market, are exempt from Federal and most State taxes because they are member-owned, democratically operated, not-for-profit organizations generally managed by volunteer boards of directors and because they have the specified mission of meeting the credit and savings needs of consumers, especially persons of modest means." Credit Union Membership Access Act, Pub. L. No. 105-219, § 2(4), 112 Stat. 913 (1998).

Finally, regardless of whether federal credit unions are federal instrumentalities for all purposes, they are clearly federal instrumentalities for purposes of determining their immunity to suit, as Congress has expressly legislated the scope of their immunity. *See Arkansas v. Farm Credit Servs. of Cent. Ark.*, 520 U.S. 821, 829 (1997).

B. Without an express waiver of immunity, which is absent here, federal instrumentalities are immune from punitive damage claims.

In *Missouri Pacific Railroad Co. v. Ault*, 256 U.S. 554, 563-65 (1921), this Court held the doctrine of sovereign immunity barred punitive fines against the United States and the director general of a federal agency absent an express waiver of that immunity by Congress. This Court held that the federal statute in that case generally waiving sovereign immunity as to "all laws and liabilities" did not waive immunity as to punitive fines. *Id.* at 563-64. By such general language, the government did not undertake "to permit any other sovereignty to punish it. . . . The purpose for which the government permitted itself to be sued was compensation, not punishment." *Id.*

Following *Missouri Pacific Railroad Co. v. Ault*, the Courts of Appeals have repeatedly held that the statutory authority of a federal instrumentality to sue and be sued is too general to waive its immunity from punitive damage claims. *See Springer*, 897 F.2d at

1089; *Smith*, 777 F.2d at 1549-50; *Rohweder*, 765 F.2d at 113; *Matter of Sparkman*, 703 F.2d at 1100-01; *Painter v. Tenn. Valley Auth.*, 476 F.2d 943, 944 (5th Cir. 1973).

The Court of Appeal here held these decisions were impliedly overruled by *FDIC v. Meyer*, 510 U.S. 471, which states that courts "'liberally construe the sue-and-be-sued clause'" and will presume that a federal instrumentality's liability "'*is the same as that of any other business.*'" *Id.* at 481 (original emphasis). The Court of Appeal was mistaken. *Meyer* does not address immunity from punitive damages. It holds only that a federal instrumentality with authority to sue and be sued is subject to suit for a constitutional tort. *See id.* at 480-83.

Moreover, this Court's decisions addressing the sue and be sued clause support immunity here. First, this Court has held that the clause allows suit only for the "'*ordinary* incidents of suits,'" *Loeffler*, 486 U.S. at 555 (quoting *Standard Oil Co. of N.J. v. United States*, 267 U.S. 76, 79 (1925)) (emphasis added), and "'the natural and appropriate incidents of legal proceedings,'" *Loeffler*, 486 U.S. at 555 (quoting *J. G. Menihan Corp.*, 312 U.S. at 85). Such ordinary and natural incidents of suit include prejudgment interest, *Loeffler*, 486 U.S. at 554-56, litigation costs, *J. G. Menihan Corp.*, 312 U.S. at 85-86, and garnishment, *Burr*, 309 U.S. at 245-46. By contrast, punitive damages are not ordinary or natural incidents of suit because, unlike prejudgment interest, litigation costs, and garnishment, they are punitive and uninsurable.

City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 266 (1981) ("Punitive damages by definition are not intended to compensate the injured party."); *PPG Indus., Inc. v. Transamerica Ins. Co.*, 975 P.2d 652, 657, 20 Cal. 4th 310, 317 (1999) ("our public policy prohibits indemnification for punitive damages").

Second, in construing the sue and be sued clause, this Court has looked for guidance to the claims that Congress has allowed against the federal government. *Keifer & Keifer*, 306 U.S. at 396-97 ("Congress has embarked upon a generous policy of consent for suits against the government sounding in tort .... Congress has thus clearly manifested an attitude which serves as *a guide* to the scope of liability implicit in the general authority it has conferred on governmental corporations to sue and be sued.") (emphasis added); *Franchise Tax Bd.*, 467 U.S. at 517 (the rule that sue and be sued clauses are liberally construed "is *in line with* the current disfavor of the doctrine of governmental immunity") (emphasis added).

As against the federal government, Congress has generally allowed claims for compensatory damages, but not punitive damages. 28 U.S.C. § 2674 ("The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for ... *punitive damages.*") (emphasis added). Because this Court has held that the federal government's immunity is "a guide" to the immunity of

federal instrumentalities, and Congress has preserved the federal government's immunity from punitive damage claims, this Court's decisions addressing the sue and be sued clause support immunity from punitive damage claims here.

Thus, consistent with *Missouri Pacific Railroad Co. v. Ault*, this Court's decisions construing the sue and be sued clause show that when Congress has authorized federal instrumentalities to sue and be sued Congress has not intended to authorize punitive damage claims against them.

Finally, the Court of Appeal here distinguished *Matter of Sparkman*, 703 F.2d 1097 and its progeny on the additional ground that at the time *Matter of Sparkman* was decided "[t]he government had a proprietary interest" in the production credit associations that were at issue in that case. App. 8-9. However, the only authority the Court of Appeal cited in support of the proposition, *In re Hoag Ranches*, 846 F.2d 1225 (9th Cir. 1988), reached the opposite conclusion. *In re Hoag Ranches* held that "[i]nitially the PCA's were largely capitalized by the government, but by 1968 all government capital had been retired and the associations were completely owned by their members." *Id.* at 1228. Federal credit unions are thus no less federal instrumentalities than the production credit associations that were the subject of *Matter of Sparkman*.

C. Defendants overcame any presumption that the sue and be sued clause waived their immunity from suit by showing that Congress did not intend the clause to encompass the punitive damage claims here.

In *FDIC v. Meyer*, this Court held that the sue and be sued clause presumptively waived immunity from suit for the constitutional tort at issue, but recognized that a federal instrumentality could overcome that presumption by a "'clea[r] show[ing] that certain types of suits are not consistent with the statutory or constitutional scheme, that an implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function, or that for other reasons it was plainly the purpose of Congress to use the "sue and be sued" clause in a narrow sense.'" 510 U.S. at 480.

Even if the presumption against immunity in *FDIC v. Meyer* applies here, defendants overcame that presumption for at least two independent reasons. First, punitive damages are not consistent with the statutory and constitutional scheme here because they are only rarely allowed against governmental entities. *Vt. Agency of Natural Res. v. United States*, 529 U.S. 765, 784-85 (2000) (recognizing "the presumption *against* imposition of punitive damages on governmental entities") (emphasis added); *City of Newport*, 453 U.S. at 267 ("Damages awarded for *punitive* purposes . . . are not sensibly assessed against the

governmental entity itself.") (original emphasis); *Evans v. Port Auth. of N.Y. & N.J.*, 273 F.3d 346, 357 (3d Cir. 2001) (public policy considerations supported immunity of Port Authority from punitive damages although Port Authority received no tax revenues and was financially independent).

Moreover, in construing the sue and be sued clause, this Court has looked for guidance to the claims that Congress has allowed against the federal government. *Keifer & Keifer*, 306 U.S. at 396-97. The refusal of Congress to allow punitive damage claims against the federal government is additional proof it has not intended to allow punitive damage claims against federal instrumentalities carrying out important governmental purposes. *See* 28 U.S.C. § 2674.

Second, federal credit unions further the important "mission of meeting the credit and savings needs of consumers, especially persons of modest means." Pub. L. No. 105-219, § 2(4), 112 Stat. 913 (1998). Congress has facilitated this mission by providing federal credit unions with an exemption from federal, state, and local taxes. 12 U.S.C. § 1768. Subjecting federal credit unions to punitive damages would undercut their important governmental mission by diverting funds they would otherwise use to make low cost loans to their members. *See Smith,* 777 F.2d at 1550 (" 'PCAs fulfill a government mission of channeling credit primarily to farmers . . . . Punitive damages would have to be paid from money that could otherwise be targeted to financing tractor equipment purchases, land expansion, or supply needs. The

government's purposes in establishing the PCAs would thus be undercut.'").

As a result, punitive damages "'are not consistent with the statutory . . . scheme'", "'[immunity] is necessary to avoid grave interference with the performance of a governmental function'", and "'it was plainly the purpose of Congress to use the "sue and be sued" clause in a narrow sense.'" *FDIC v. Meyer*, 510 U.S. at 480 (quoting *Burr*, 309 U.S. at 245).

Nonetheless, the Court of Appeal below held that defendants could not satisfy *FDIC v. Meyer* because they presented no *evidence* of prejudice from the specific punitive damage awards in this case. App. 12. Not so. The question of immunity is one of Congressional *intent*. *FDIC v. Meyer*, 510 U.S. at 480 (the issue is "'the purpose of Congress'"); *Franchise Tax Bd. of Cal.*, 467 U.S. at 521; *Fed. Land Bank of St. Louis v. Priddy*, 295 U.S. 229, 231 (1935). As defendants have shown, subjecting federal credit unions to punitive damage claims would undermine the intent of Congress in creating federal credit unions. Defendants thus clearly established their immunity from the punitive damage claims here.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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153 Cal.App.4th 1351

Court of Appeal, Fifth District, California.
Kimberly McGEE, Plaintiff and Respondent,
v.
TUCOEMAS FEDERAL CREDIT UNION et al.,
Defendants and Appellants.
Nos. F049458, F049715.

Aug. 2, 2007.
Review Denied Nov. 14, 2007.

Horvitz & Levy, Peter Abrahams and Robert H. Wright, Encino; Borton, Petrini & Conron, J. David Petrie and Sean T. O'Rourke, for Defendants and Appellants.

Richardson & Harman, Paul F. Schimley, Pasadena, and Richard C. Moore, for California Credit Union League as Amicus Curiae on behalf of Defendants and Appellants.

Pine & Pine, Norman Pine and Beverly Tillett Pine, Los Angeles; Penner, Bradley & Buettner and Peter Sean Bradley, Fresno; Wagner & Jones and Andrew B. Jones, Fresno, for Plaintiff and Respondent.

OPINION

LEVY, Acting P.J.

The primary issue presented in this appeal is whether a federally chartered credit union is subject to punitive damages. Appellants, Tucoemas Federal Credit Union (Credit Union) and Linda Reese, the

Credit Union's chief executive officer, contend the punitive damages awarded in favor of respondent, Kimberly McGee, on her employment discrimination claims must be reversed on the ground of sovereign immunity. According to appellants, the Credit Union, as a federal instrumentality, cannot be held liable for punitive damages absent an express waiver of its immunity from those claims. Appellants further argue that, in any event, the trial court should have reduced the punitive damage award when it reduced the compensatory damage award.

As discussed below, in the absence of certain narrow exceptions, federal "instrumentalities" that are subject to a "sue and be sued" clause are presumed to have fully waived immunity. These exceptions were not established by appellants. Accordingly, the trial court correctly concluded that appellants were not immune from the punitive damage award. Further, despite the reduction in compensatory damages, there remains a reasonable relationship between the compensatory and the punitive damages. Therefore, the judgment will be affirmed.

BACKGROUND

McGee was employed by the Credit Union as the Vice President of Lending. In May 2003 McGee was diagnosed with breast cancer. McGee took a leave of absence for surgery and chemotherapy. Due to her relatively young age, 43, McGee's oncologist, Dr. Hsu, prescribed an aggressive course of chemotherapy.

Appellants required McGee to return to work within four months, by September 15. McGee was told that if she needed any more time beyond that to recuperate, she would be fired.

McGee's last chemotherapy treatment was scheduled for September 8. Because the treatments made McGee tired and nauseous, she requested an accommodation to permit working part of the time at home. From past experience, McGee knew that with the use of her computer, fax machine, and telephone, most of her job duties could be accomplished from her home for a short period of time. However, appellants refused this request outright and told McGee that if she did not return to work within one week, i.e., by September 15, she would be demoted to branch manager at an 11 percent pay decrease.

When McGee explained to Dr. Hsu that she would be fired if she did not return to work, he prepared a full release for her. McGee reported to work on September 15. Even though McGee complied with appellants' demand, she was demoted to a branch manager position. At trial, Reese admitted that this action was taken because McGee asked for a temporary accommodation.

Due to the demotion, McGee had reduced work hours. Based on the reduced hours, appellants cancelled McGee's medical insurance and cut her salary in half. McGee was extremely upset about the loss of medical coverage. The anticipated cost of her upcoming radiation treatments alone was over $60,000.

The branch manager position involved greater physical demands on McGee. Further, Reese engaged in a pattern of behavior that McGee found humiliating. McGee ceased her employment with the Credit Union due to stress.

McGee filed the underlying complaint alleging causes of action under the Fair Employment and Housing Act for retaliation, failure to engage in good-faith interactive process, failure to provide a reasonable accommodation, and disability discrimination. The jury ruled in favor of McGee and awarded $2,041,558 in compensatory damages, with a set off of $51,173, for a total of $1,990,385. The jury further found that the Credit Union and Reese engaged in the conduct with malice, oppression or fraud and awarded punitive damages of $1,200,000 against the Credit Union and $7,000 against Reese.

Appellants filed various posttrial motions including for a new trial due to excessive damages. The trial court conditionally granted this new trial motion unless McGee accepted a reduction of the compensatory damages by $750,000. McGee accepted the reduction. The trial court refused to remit any portion of the punitive damages.

DISCUSSION

1. *The Credit Union is not immune from punitive damages.*

The United States government is immune from civil penalties absent an express and unequivocal

waiver of that immunity. (*Missouri Pac. R.R. Co. v. Ault* (1921) 256 U.S. 554, 563-564, 41 S.Ct. 593, 65 L.Ed. 1087.) However, the government does not become the conduit of its immunity in suits against its agents or instrumentalities merely because they do its work. (*Keifer & Keifer v. R.F.C.* (1939) 306 U.S. 381, 388, 59 S.Ct. 516, 83 L.Ed. 784.)

Congress has waived the sovereign immunity of certain federal government agencies and instrumentalities from the time of their inception by including a "sue and be sued" clause in the enabling legislation. (*Loeffler v. Frank* (1988) 486 U.S. 549, 554, 108 S.Ct. 1965, 100 L.Ed.2d 549.) Unlike waivers given by the federal government itself, such a "sue and be sued" waiver is to be given "a liberal – that is to say, expansive-construction," (*Postal Service v. Flamingo Industries (USA) Ltd.* (2004) 540 U.S. 736, 741, 124 S.Ct. 1321, 158 L.Ed.2d 19) "notwithstanding the general rule that waivers of sovereign immunity are to be read narrowly in favor of the sovereign." (*FDIC v. Meyer* (1994) 510 U.S. 471, 480, 114 S.Ct. 996, 127 L.Ed.2d 308.)

Encompassed within this liberal construction rule is the principle that "sue and be sued" includes the natural and appropriate incidents of legal proceedings. (*Loeffler v. Frank, supra,* 486 U.S. at p. 555, 108 S.Ct. 1965.) It must be presumed that when Congress launches a governmental agency or instrumentality into the commercial world and endows it with authority to "'sue or be sued,'" that entity is not less amenable to judicial process than a private

enterprise under like circumstances would be. (*F.H.A. v. Burr* (1940) 309 U.S. 242, 245, 60 S.Ct. 488, 84 L.Ed. 724.) Accordingly, federal entities have been found not to be immune from prejudgment interest (*Loeffler v. Frank, supra,* 486 U.S. at p. 565, 108 S.Ct. 1965), garnishment (*F.H.A. v. Burr, supra,* 309 U.S. at p. 247, 60 S.Ct. 488), orders to withhold delinquent state taxes (*Franchise Tax Board of California v. USPS* (1984) 467 U.S. 512, 525, 104 S.Ct. 2549, 81 L.Ed.2d 446), and civil penalties based on violations of state environmental requirements (*Com. of Pa. Dept. of Env. Res. v. U.S. Postal Serv.* (3d Cir.1993) 13 F.3d 62, 69).

With three exceptions, "sue-and-be-sued" clauses cannot be limited by implication. (*FDIC v. Meyer, supra,* 510 U.S. at p. 480, 114 S.Ct. 996.) A federal agency or instrumentality is not immune unless it can clearly show that (1) certain types of suits are not consistent with the statutory or constitutional scheme; (2) an implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function; or (3) for other reasons it was plainly the purpose of Congress to use the "sue-and-be-sued" clause in a narrow sense. (*Ibid.*) Absent such a showing, federal agencies or instrumentalities authorized to "'"sue and be sued"'" are presumed to have *fully waived immunity.* (*Id.* at p. 481, 114 S.Ct. 996.)

Unlike certain other federal entities, such as production credit associations, federal credit unions have not been legislatively declared to be federal

"instrumentalities." Nevertheless, while not federal agencies, federal credit unions have been judicially found to be, as a general matter, federal instrumentalities, i.e., lesser in scope and in responsibility than actual government agencies. (*TI Federal Credit Union v. DelBonis* (1st Cir.1995) 72 F.3d 921, 935.)

For purposes of this opinion, we will assume that the Credit Union is a federal instrumentality.[1] However, contrary to appellants' position, this federal instrumentality status does not in and of itself provide the Credit Union with immunity from punitive damages. An entity is not entitled to the same immunities as the United States simply by virtue of its federal instrumentality status. (*Arkansas v. Farm Credit Servs. of Central Ark.* (1997) 520 U.S. 821, 832, 117 S.Ct. 1776, 138 L.Ed.2d 34.) Rather, as a federal entity that Congress has decreed can sue or be sued (12 U.S.C. § 1757(2)), a federal credit union is presumed to have fully waived immunity unless it can explain why it is immune under the three-part test set forth above. (Cf. *FDIC v. Meyer, supra,* 510 U.S. at pp. 480-481, 114 S.Ct. 996.)

---

[1] McGee argues that the Credit Union has not adequately proved its status as a federal credit union at the times material to this case. However, McGee has judicially admitted that the Credit Union is a federal credit union by alleging so in her complaint. Since we are assuming that the Credit Union is a federal instrumentality, appellants' request for judicial notice of the Credit Union's organization certificate is denied as irrelevant. The remaining requests for judicial notice are granted.

In asserting their immunity, appellants rely on a line of cases that began with the production credit association decision of *Matter of Sparkman* (9th Cir.1983) 703 F.2d 1097. There, a two-judge majority held that, as a legislatively declared instrumentality of the United States, a production credit association was not subject to liability for punitive damages absent an express waiver of such immunity. The *Sparkman* majority concluded that, "while the 'sue and be sued' clause in the enabling legislation for production credit associations waives sovereign immunity from ordinary lawsuits, it does not subject production credit associations to liability for punitive damages." (*Id.* at p. 1101.) However, one judge disagreed concluding that, in light of the Supreme Court's pronouncement that the "'sue-and-be-sued'" waiver is to be liberally construed, no limitation of this waiver to actual damages should be implied. (*Id.* at p. 1102 (conc. & dis. opn. of Frye, J.).)

Several cases have followed *Matter of Sparkman, supra,* including one California appellate decision. (*Smith v. Russellville Production Credit Ass'n* (11th Cir.1985) 777 F.2d 1544; *Rohweder v. Aberdeen Production Credit Ass'n* (8th Cir.1985) 765 F.2d 109; *Commerce Federal Sav. Bank v. FDIC* (6th Cir.1989) 872 F.2d 1240; *Woodland Production Credit Assn. v. Nicholas* (1988) 201 Cal.App.3d 123, 251 Cal.Rptr. 791.) However, the continued validity of *Sparkman* is questionable.

First, when *Matter of Sparkman, supra,* was decided in 1983, the government managed production

credit associations. The role of the Farm Credit Administration was as a supervisor, not an arm's-length regulator. Production credit associations were not privately owned, organized and operated. The government had a proprietary interest. (*In re Hoag Ranches* (9th Cir.1988) 846 F.2d 1225, 1229.) In contrast, although the structure of a federal credit union and the duties of its various corporate parts are highly regulated by federal statute, a federal credit union is member owned and operated, i.e., privately owned, not government owned. (*Cuenca v. Safeway San Francisco Employees Fed. Credit Union* (1986) 180 Cal.App.3d 985, 995, 225 Cal.Rptr. 852; 12 U.S.C. §§ 1752(1) and 1757.) Accordingly, the relevance of *Matter of Sparkman* to federal credit unions is extremely limited.

More importantly, however, the *Sparkman* analysis is inconsistent with subsequent United States Supreme Court authority. In *Sparkman,* the Ninth Circuit concluded that a federal instrumentality subject to a "'sue and be sued'" clause retains its immunity from punitive damages unless Congress *explicitly* authorizes liability for such damages. (*Matter of Sparkman, supra,* 703 F.2d at p. 1101.) However, the Supreme Court set forth a contrary analytical framework in *FDIC v. Meyer, supra,* 510 U.S. 471, 114 S.Ct. 996, 127 L.Ed.2d 308. There, the court explained that "sue-and-be-sued" clauses cannot be limited by implication unless there has been a clear showing of one of three narrow exceptions. "Absent such a showing, agencies 'authorized to "sue

and be sued" are presumed to have *fully waived immunity.'"* (*Id.* at p. 481, 114 S.Ct. 996, emphasis added.) Consequently, in accordance with Supreme Court authority, we must start from the premise that the Credit Union waived immunity from punitive damages.

Noting that "sue and be sued" has been defined by the Supreme Court as including a waiver of the natural and appropriate incidents of legal proceedings (*Loeffler v. Frank, supra,* 486 U.S. at p. 555, 108 S.Ct. 1965), appellants argue it should not apply to punitive damages because such damages are not an ordinary incident of suit. Rather, punitive damages are extraordinary and are meant to punish the defendant, not compensate the plaintiff. However, although not commonly imposed, punitive damages are authorized by statute as an incident of suit, i.e., they are natural and appropriate in certain cases. (Civ.Code, § 3294.) Further, liability for punitive damages is consistent with the presumption that the liability of a government instrumentality launched into the commercial world is the same as that of any other business. (Cf. *Franchise Tax Board of California v. USPS, supra,* 467 U.S. at p. 520, 104 S.Ct. 2549.) Therefore, as with other incidents of suit, immunity from punitive damages is presumed to be waived by a "sue and be sued" clause.

Nevertheless, as outlined above, there are three exceptions to this waiver presumption. The Credit Union will be found to be immune from punitive damages if it can be "'clearly shown'" (1) that punitive

damages "'are not consistent with the statutory or constitutional scheme'"; (2) that an implied restriction of punitive damages "'is necessary to avoid grave interference with the performance of a governmental function'"; or (3) "'that for other reasons it was plainly the purpose of Congress to use the "sue and be sued" clause in a narrow sense.'" (*Loeffler v. Frank, supra,* 486 U.S. at p. 554, 108 S.Ct. 1965.)

Appellants contend that two of these exceptions apply. Appellants first argue that a punitive damage claim is inconsistent with "the statutory scheme generally exempting the federal government and its instrumentalities from punitive damages." In support of this position, appellants rely on the presumption against imposing punitive damages on taxpayers through government entities (*Vermont Agency of Natural Resources v. United States ex rel. Stevens* (2000) 529 U.S. 765, 785, 120 S.Ct. 1858, 146 L.Ed.2d 836), and on the government's statutory exemption from liability for punitive damages under both Title VII (42 U.S.C. § 1981a(b)(1)) and the Federal Tort Claims Act (28 U.S.C. § 2674).

Regardless, federal credit unions are not the government. Rather, they are privately owned cooperative associations. Federal credit unions are not supported by taxpayer dollars. Thus, the punitive damages would not unduly burden taxpayers and be "'"borne by widows, orphans, aged men and women, and strangers. . . ."'" (*Vermont Agency of Natural Resources v. United States ex rel. Stevens, supra,* 529 U.S. at p. 785, fn. 15, 120 S.Ct. 1858.) Further,

neither Title VII nor the Federal Tort Claims Act is relevant here. This case is based on state employment discrimination claims. Moreover, it is questionable whether a federal credit union would even be considered a federal agency for purposes of the Federal Tort Claims Act. (Cf. *Lewis v. U.S.* (9th Cir.1982) 680 F.2d 1239 [while federal instrumentalities for some purposes, the independent, privately owned and locally controlled federal reserve banks are not federal agencies under the Federal Tort Claims Act].) Thus, appellants have not clearly shown that punitive damages are inconsistent with the statutory scheme.

Appellants further contend that subjecting federal credit unions to punitive damages would gravely interfere with the performance of a government function, that of meeting the credit and savings needs of consumers, especially persons of modest means. According to appellants, punitive damage awards would drain the financial resources of federal credit unions and interfere with their ability to extend low cost loans to their members.

However, there is no evidence to support appellants' argument. Rather, it is based on speculation alone. As noted by the trial court, the Credit Union has a functional net worth of $16 million and its management receives significant bonuses. Thus, while the $1.2 million punitive damage award might decrease member equity and possible member dividends, there is no evidence that it would affect the Credit Union's ability to meet the credit needs of consumers.

Further, punitive damage awards have judicial limits and will be reversed if excessive. The nature of the defendant's acts, the amount of compensatory damages awarded and the wealth of the defendant must all be considered. (*Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.* (1984) 155 Cal.App.3d 381, 389, 202 Cal.Rptr. 204.) The poorer the wrongdoing defendant, the smaller the punitive damages award will be. (*Id.* at p. 390, 202 Cal.Rptr. 204.) Accordingly, a punitive damage award does not inevitably lead to financial ruin.

In sum, when analyzed within the framework set forth by the United States Supreme Court, it must be concluded that the "sue and be sued" clause in the federal credit union enabling legislation presumptively waives immunity from punitive damages. Since appellants have failed to clearly show the applicability of an exception to this waiver presumption, sovereign immunity does not apply.

2. *The reduction in compensatory damages did not require a corresponding reduction in punitive damages.*

As noted above, the trial court remitted the approximately $2 million compensatory damages award by $750,000 but refused to remit the $1.2 million punitive damages award. Appellants contend the trial court erred in that the compensatory damages reduction required a corresponding punitive damages reduction.

In assessing a punitive damage award, the appellate court considers the nature of the defendant's acts, the amount of compensatory damages awarded, and the wealth of the defendant. (*Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928, 148 Cal.Rptr. 389, 582 P.2d 980.) While punitive damages must bear a reasonable relation to actual damages, no fixed ratio exists to determine the proper proportion. (*Liodas v. Sahadi* (1977) 19 Cal.3d 278, 284, 137 Cal.Rptr. 635, 562 P.2d 316.) Rather, calculating punitive damages involves a fluid process of adding or subtracting depending on the circumstances. (*Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc., supra,* 155 Cal.App.3d at p. 390, 202 Cal.Rptr. 204.)

Within this framework, juries have wide discretion to determine what punitive damage award is proper. (*Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc., supra,* 155 Cal.App.3d at p. 390, 202 Cal.Rptr. 204.) There is no simple formula for calculating punitive damages in that there is no particular sum that represents the *only* correct amount for such damages in any given case. Instead, there is a wide range of reasonableness for punitive damages reflective of the fact finder's human response to the evidence presented. (*Id.* at p. 391, 202 Cal.Rptr. 204.) On appeal, high ratios of punitive damages to compensatory damages, as much as 2000 to 1, have been affirmed. (*Id.* at p. 390, 202 Cal.Rptr. 204.)

Based on these principles, a reduction in compensatory damages does not mandate a corresponding reduction in punitive damages. There is no

requirement that the original ratio between compensatory and punitive damages as measured by the jury remain. (*Betts v. Allstate Ins. Co.* (1984) 154 Cal.App.3d 688, 712, 201 Cal.Rptr. 528.) Rather, the court must evaluate the case based on the factors set forth above, i.e., the nature of the defendant's acts, the amount of compensatory damages and the defendant's wealth. While all three factors must be satisfied, "the 'most important question is whether the amount of the punitive damages award will have deterrent effect – without being excessive.'" (*Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1255, 1 Cal.Rptr.2d 301.)

Applying the above considerations to this case, it cannot be concluded that the punitive damages were excessive as a matter of law. Appellants' conduct was reprehensible. Following McGee's cancer surgery, appellants engaged in a pattern of behavior aimed at humiliating McGee and forcing her to quit. Appellants refused to provide McGee with medical accommodation, threatened to fire her if she did not return after four months and, when McGee did timely return, appellants demoted her, cut her pay in half and cancelled her medical coverage. Moreover, the award bears a reasonable relation to the actual damages as reduced, approximately 1 to 1. Further, there is no evidence that the award will constitute an undue burden on the Credit Union or precipitate financial ruin.

By issuing the one remittitur but not the other, the court made an implied finding that the punitive

award was correct. (*Betts v. Allstate Ins. Co., supra,* 154 Cal.App.3d at p. 712, 201 Cal.Rptr. 528.) Deference to the trial court is appropriate in this case. (Cf. *Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc., supra,* 155 Cal.App.3d at p. 392, 202 Cal.Rptr. 204.)

DISPOSITION

The judgments are affirmed. Costs on appeal are awarded to respondent.

WE CONCUR: CORNELL and DAWSON, JJ.

SUPERIOR COURT OF CALIFORNIA COUNTY OF TULARE	
Mcgee, Kimberly vs., Plaintiff/Petitioner, vs. **Tucoemas Federal Credit Union,** Defendant/Respondent.	Jud. Officer: **Patrick O'Hara** Clerk: **Regina Watkins** Bailiff: _____ CSR: **Rhonda Flanagan** Interpreter: Language:
Minutes: **Motion Hearing Strike** Date: **October 26, 2004**	**Case No. VCU210172** **Department 6** Related Cases:

Appearances: ☒ No appearances

☐ Party: ___ ☐ Attorney: ___

☐ Party: ___ ☐ Attorney: ___

☐ Other ___ ☐ Attorney: ___

Motion: Defendant Tucoemas Federal Credit Union's Demurrer and Motion to Strike to Plaintiff's First Amended Complaint

Tentative ruling is adapted as the order of the court.

Ruling: Judge O'Hara discloses that he is a member of Tucoemas Federal Credit Union maintaining a savings and checking account, but this would not influence his ability to decide this matter impartially. He does not know any of the parties in the lawsuit.

With this disclosure, the court overrules the demurrer and motion to strike except to the 6th cause of action for harassment. The court sustains the demurrer to the 6th cause of action without leave to amend. Defendant must answer within 10 days.

Plaintiff has stated a cause of action under the 1st and 4th Causes of Action, and has sufficiently alleged a claim for punitive damages with the new allegations as to the corporate entity.

The court declines to follow the argument that punitive damages are not available against a federally chartered credit union, as no case law on point as been provided. Whether or not Plaintiff engaged in a good faith interactive communication for accommodation is for another day, but the facts sufficiently allege a cause of action.

However, the facts alleged in the First Amended Complaint to not meet any of the definitions of "harassment." And under these facts the court does not find that Plaintiff would he able to amend in order to allege a cause of action for harassment. Therefore, no leave to amend is granted.

If no one requests oral argument, under CCP section 1019.5(a) and CRC 391(a), no further written order is necessary. The minute order adopting this tentative ruling will become the

order of the court and service by the clerk will constitute notice of the order.

SUPERIOR COURT OF CALIFORNIA
COUNTY OF TULARE

KIMBERLY McGEE,

Plaintiff,

vs.

TUCOEMAS FEDERAL CREDIT UNION, LINDA REESE,

Defendants.

Case No. ~~03-205916~~ VCU 210172

JUDGMENT ON JURY TRIAL

(Filed Oct. 6, 2005)

This action came on regularly for trial on September 12, 2005 in Department 10 of the Superior Court, County of Tulare, the Honorable Lloyd Hicks presiding. The plaintiff appearing by attorneys Peter Sean Bradley of Penner, Bradley & Buettner and Andrew Jones of Wagner & Jones and the defendants appearing by attorney J. David Petrie of Borton, Petrini & Conron.

A jury of twelve persons was regularly impaneled and sworn to try the action. Witnesses on the part of both plaintiff and defendants were sworn and examined. After hearing the evidence, being duly instructed by the Court, the jury deliberated and thereon duly returned the following special verdicts:

Kimberly McGee v. Tucoemas – Timely, Good-faith Interactive Process.

1. Did Tucoemas Federal Credit Union ("Tucoemas") fail to engage in a timely, good-faith interactive process with Kimberly McGee after she requested a reasonable accommodation?

Answer: Yes

2. Did Kimberly McGee prevent Tucoemas from engaging in a timely, good-faith interactive process after she requested a reasonable accommodation?

Answer: No

3. Was Tucoemas' failure to engage in a timely good-faith interactive process a substantial factor in causing harm to Kimberly McGee?

Answer: Yes

Kimberly McGee v. Tucoemas – Reasonable Accommodation.

4. Did Tucoemas fail to provide a reasonable accommodation to Kimberly McGee's serious medical condition or physical disability?

Answer: Yes

5. Would Kimberly McGee's proposed accommodations have created an undue hardship to the operation of Tucoemas' business?

Answer: No

6. Was Tucoemas' failure to provide a reasonable accommodation a substantial factor in causing harm to Kimberly McGee?

Answer: Yes

Kimberly McGee V. Tucoemas – Disability Discrimination.

7. Was Kimberly McGee able to perform the essential job duties of Vice-President of Lending with or without a reasonable accommodation?

Answer: Yes

8. Was Kimberly McGee's serious medical condition or disability, or Tucoemas' perceptions about her serious medical condition or physical disability, a motivating reason for Tucoemas' reassignment, reduction in wage, salary, or fringe benefits?

Answer: Yes

9. Was the reassignment, reduction in wage or salary, or loss of fringe benefits a substantial factor in causing harm to Kimberly McGee?

Answer: Yes

Kimberly McGee V. Tucoemas – Retaliation.

10. Did Tucoemas reduce Kimberly McGee's wage, salary, or fringe benefits or refuse to return her to Vice President of Lending?

Answer: Yes

11. Was Kimberly McGee's request that Tucoemas engage in a timely, good-faith interactive process, or that it provide her with a reasonable accommodation, or her assertion of legal rights, a motivating reason for Tucoemas' decision to reduce Kimberly McGee's salary or fringe benefits or to refuse to return her to the position of Vice President of Lending?

Answer: Yes

12. Was Tucoemas' retaliatory conduct a substantial factor in causing harm to Kimberly McGee?

Answer: Yes

Kimberly McGee v. Linda Reese – Retaliation.

13. Did Linda Reese reduce Kimberly McGee's wage, salary, or fringe benefits or refuse to return her to Vice President of Lending?

Answer: Yes

14. Was Kimberly McGee's request that Tucoemas engage in a timely, good-faith interactive process, or that it provide her with a reasonable accommodation, or her assertion of legal rights, a motivating reason for Linda Reese to reduce Kimberly McGee's salary or fringe benefits or to refuse to return her to the position of Vice President of Lending?

Answer: Yes

15. Was Linda Reese's retaliatory conduct a substantial factor in causing harm to Kimberly McGee?

Answer: Yes

Liability.

16. Have you answered "yes" to one or more of questions 3, 6, 9, 12 or 15?

Answer: Yes

Damages.

17. What are Kimberly McGee's damages?

a. Past economic loss, including lost wage and salary and lost fringe benefits: $133,047

b. Future economic loss, including lost wages and salary and lost fringe benefits: $408,511

a. Past non-economic loss, including emotional distress: $1,000,000

b. Future non-economic loss, including emotional distress: $500,000

Punitive Damages Against Tucoemas.

18. Did Tucoemas engage in the conduct with malice, oppression or fraud?

Answer: Yes

Punitive Damages Against Linda Reese.

19. Did Linda Reese engage in the conduct with malice, oppression or fraud?

Answer: Yes

Signed: Smith Dated: 10-5-05
Jury Foreperson

SPECIAL VERDICT – PUNITIVE DAMAGES

1. Was Linda Reese an officer, director, or managing agent of Tucoemas Federal Credit Union acting in a corporate or employment capacity?

Answer: Yes

2. What amount of punitive damages, if any, do you award for plaintiff against Tucoemas Federal Credit Union?

$1,200,000

3. What amount of punitive damages, if any, do you award for plaintiff against Linda Reese?

$7,000

Signed: Smith Dated: 10-5-05
Jury Foreperson

The parties stipulated that past economic losses adjudged against defendant Tucoemas Federal Credit Union were to be offset by prior temporary disability payments made to plaintiff by Tucoemas Federal Credit Union worker's compensation carrier and that

the judgment against defendants would therefore be reduced by $51,173.43.

NOW, THEREFORE, IT IS ADJUDGED, ORDERED AND DECREED that plaintiff Kimberly McGee recover compensatory damages from defendants Tucoemas Federal Credit Union and Linda Reese in the sum of $1,990.384.56.

NOW, THEREFORE, IT IS FURTHER ADJUDGED, ORDERED AND DECREED that plaintiff Kimberly McGee recover from defendant Tucoemas Federal Credit Union punitive damages in the amount of $1,200,000, and from defendant Linda Reese for punitive damages in the amount of $7,000 in addition to untaxed costs.

Attorneys' fees will be determined by post-trial motion.

Dated: October 6, 2005

/s/ LLOYD L HICKS
HON. LLOYD HICKS
Judge of the Superior Court

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF TULARE

KIMBERLY McGEE Petitioner, vs, TUCOEMAS FEDERAL CREDIT UNION, et al, Defendants.	Case No. 04-210172 **RULING ON DEFENDANT'S MOTION FOR JUDGMENT NOT WITH STANDING VERDICT AS TO PUNITIVE DAMAGES**

(Filed Nov. 23, 2005)

Is Defendant immune from punitive damages as an "instrumentality" of the Federal government?

"The theory of sovereign immunity originated in the fiction that the king can do no wrong. It may be said that the doctrine arose in former times from the practical necessity of enabling the state to exercise its governmental functions unhampered by the demands on the exchequer resulting from the carelessness or mistakes of its officers and agents in the discharge of their official duties . . . " People v. S. Ct. (1947) 29 C.2d 754.

Except where statutory consent is conferred, the United States is not liable for torts. The federal Tort Claims Act does waive such immunity, but provides that the United States shall not he liable for interest prior to judgment or for punitive damages. 28 U.S.C.

Section 2674. For purposes of the Act, "United States" includes "federal agencies," and these include "corporations primarily acting as instrumentalities or agencies of the United States, . . . " (28 U.S.C. section 2671.)

Defendant contends that it is such an instrumentality and, as such, is immune from punitive damages.

Plaintiff argues that Defendant is in effect seeking reconsideration of a prior order denying its motion to strike punitive damages and that cannot now do so. Sovereign immunity goes to the jurisdiction of the court, is not waivable, and may be asserted at any time. Defendant's motion will be considered on its merits.

The court will assume for purposes of argument that Defendant is in fact a federally chartered credit union, though that fact may not be in evidence.

The question on a motion for JNOV is whether there is any evidence to support a verdict. If punitive damages are not recoverable as a matter of law, then presumably a verdict for punitive damages cannot stand, no matter the evidence justifying such an award in the abstract.

Defendant argues that it is an "instrumentality" for the purposes of immunity from punitive damages, while commendably admitting that there is no controlling authority on this issue.

Defendant cites to cases involving Production Credit Associations (*Woodland PCA v. Nichols*; *Sparkman v. Merced PCA*, and to cases relating to the exemption of federal credit unions from state and local taxes (*California Credit Union League v. Anaheim; U.S.V. Michigan*) and to cases involving time limits for bankruptcy claims (*T.I v. Delbois*).

The tax cases are not helpful, because federal credit unions are immune from certain taxes by statue and sovereignty issues need to be reached. The bankruptcy case involves entirely different purposes and principals. The PCA cases are closer, but there are significant distinctions between the level of federal involvement in PCAs and credit unions. As pointed out in Sparkman, PCAs are primary means of federal assistance for farmers and were enabled to permit farmers to participate in the management and control of ag credit. Furthermore, PCAs are statutorily designated as an "instrumentality" and credit unions are not.

Defendant also relies on cases decided in the Federal District Court (unreported). These cases however, just take the literal language involving other entities (PCAs) with different statutory purposes and degrees of "government function", and cases regarding other purposes (taxes), and do not engage in any analysis of underlying principles. They are therefore not persuasive for their reasoning, which is the only basis for their consideration.

There has been presented no binding authority requiring that Defendant be characterized as an "instrumentality" for any purpose and no persuasive reasoning on the issue. However, it is not necessary for a determination of the question here to find that Defendant is not an "instrumentality"

Defendant assumes (as did the District Court decision) that if an entity is properly labeled an "instrumentality" then it is automatically immune from punitive damages. This is not the case. The authorities show that an entity may be an "instrumentality" for one purpose, but not all.

The Supreme Court in *Arkansas v. Farm Credit Services of Central Arkansas* (1997) 520 U.S. 821 held that instrumentality status did not in and of itself entitle an entity to the same immunities as the United States (there, involving exemption from the requirements of the Tax Injunction Act). The court there noted that "The federal balance is well served when the several states define and elaborate their own laws through their own courts and administrative processes and without undue interference from the federal judiciary."

The court noted that PCA's were defined and controlled by federal law and that their interests were the same as the United States, but that " . . . This argument is insufficient to justify an exception . . . ", and that an entity may enjoy certain benefits and immunities conferred by statute " . . . Without the further inference that the instrumentality has all

of the rights and privileges of the National Government."

The Court found that each instrumentality must be examined in light of its government role and the wishes of Congress as expressed in statutes. It noted that PCAs are not given the right to exercise government regulatory authority, but rather serve commercial purposes; that their interests are no more the same as the government than most commercial interests; that they do not have power analogous to any federal regulatory agency and "this suffices for us to conclude that instrumentalility status does not in and of itself entitle an entity to the same exception as the United States . . . " The Court concluded by noting that this result furthers the State's interest without sacrificing those of the United States.

The question thus devolves to: given the purpose behind sovereign immunity from punitive damages, should this federally chartered credit union be immune from the enforcement mechanism for disability discrimination selected by the state of California?

Defendant here has an equity (functional net worth) of c. $ 16,000,000. There is no evidence that payment of $ 1,200,000.00 in damages would impair even the purely private functions of the credit union, let alone any government related functions, and clearly would not. While it would decrease member (shareholder) equity and possibly member dividends, there is no evidence that it would affect the ability to provide credit to working class people, low income

people, minorities,, or anyone else. There was evidence that management received significant (8 percent) bonuses and these could be discontinued without impact on the functioning of the business. There is no evidence such payment would affect its ability to invest in U.S. obligations; to be a fiscal agent of the U.S. or a depository for public funds. There is no evidence or authority that Congress intended to broaden the concept of Sovereign immunity to include privately owned and operated businesses, which may be chartered under Federal authority, be subject to Federal regulation, or which may perform functions which may be beneficial to the government or the public.

Defendant is owned, supported and financed by the private funds of its depositors. It is not financially supported by government funds. Its primary activity is the commercial activity of lending. It is a private organization, operated by private citizens primarily for a private purpose. Congress did not see fit to statutorily designate credit unions as a federal instrumentality (as it did PCA's).

Payment of the award will not have the effect of restraining the federal government from acting or compelling it to act.

On the other hand to disallow the award would upset the "federal balance" and would impair California's ability to use its legislatively chosen remedies to enforce its historic police powers (which specifically include employment discrimination remedies – see

Government Code section 12920). It thus furthers the State's interests without impairing those of the federal government.

Thus, whether or not Defendant is an "instrumentality" of the federal government for some purposes, the public policy behind the sovereign immunity doctrine does not require that Defendant be immune from punitive damages, and principles of Federalism require that California be able to select its own remedies for victims of discrimination.

Defendant's argument that its members were denied due process is without merit.

Defendant's motion is therefore denied.

Dated: 11-23-2005 /s/ Lloyd Hicks
Lloyd Hicks
Judge of the Superior Court

IN THE

Court of Appeal of the State of California

IN AND FOR THE

Fifth Appellate District

KIMBERLY McGEE, Plaintiff and Respondent, v. TUCOEMAS FEDERAL CREDIT UNION et al., Defendants and Appellants.	F049458 and F049715 (Super. Ct. No. 04-210172) **ORDER**

(Filed Sep. 4, 2007)

Appellants' petition for rehearing filed in the above entitled matter is denied.

/s/ Levy
Levy, Acting P.J.

WE CONCUR:

/s/ Cornell
Cornell, J.

/s/ Dawson
Dawson, J.

Court of Appeal, Fifth Appellate District – No. F049458
S156198

IN THE SUPREME COURT OF CALIFORNIA

En Banc

KIMBERLY MCGEE, Plaintiff and Respondent,

v.

TUCOEMAS FEDERAL CREDIT UNION et al.,
Defendants and Appellants.

(Filed Nov. 14, 2007)

The petition for review is denied.

GEORGE
Chief Justice

The relevant provisions of the Federal Credit Union Act, 12 U.S.C. §§ 1752, 1752a, 1754, 1756-1759, 1761, and 1766-1768, state in part:

§ 1752. Definitions

As used in this chapter –

(1) the term "Federal credit union" means a cooperative association organized in accordance with the provisions of this chapter for the purpose of promoting thrift among its members and creating a source of credit for provident or productive purposes;

. . . .

(4) the term "Board" means the National Credit Union Administration Board;

. . . .

§ 1752a. National Credit Union Administration

(a) Establishment; management under National Credit Union Administration Board

There is established in the executive branch of the Government an independent agency to be known as the National Credit Union Administration. The Administration shall be under the management of a National Credit Union Administration Board. . . .

§ 1754. Approval of organization certificate.

The organization certificate shall be presented to the Board for approval. Before any organization certificate is approved, an appropriate investigation shall be made for the purpose of determining (1) whether the organization certificate conforms to the provisions of this chapter; (2) the general character and fitness of the subscribers thereto; and (3) the economic advisability of establishing the proposed Federal credit union. Upon approval of such organization certificate by the Board it shall be the charter of the corporation, and one of the originals thereof shall be delivered to the corporation after the payment of the fee required therefor. Upon such approval the Federal credit union shall be a body corporate and as such, subject to the limitations herein contained, shall be vested with all of the powers and charged with all of the liabilities conferred and imposed by this chapter upon corporations organized hereunder.

§ 1756. Reports and examinations.

Federal credit unions shall be under the supervision of the Board, and shall make financial reports to it as and when it may require, but at least annually. Each Federal credit union shall be subject to examination by, and for this purpose shall make its books and records accessible to, any person designated by the Board.

§ 1757. Powers.

A Federal credit union shall have succession in its corporate name during its existence and shall have power –

. . . .

(2) to sue and be sued;

. . . .

(5) to make loans, the maturities of which shall not exceed twelve years except as otherwise provided herein, and extend lines of credit to its members, to other credit unions, and to credit union organizations and to participate with other credit unions, credit union organizations, or financial organizations in making loans to credit union members. . . .

§ 1758. Bylaws

In order to simplify the organization of Federal credit unions the Board shall from time to time cause to be prepared a form of organization certificate and a form of bylaws, consistent with this chapter, which shall be used by Federal credit union incorporators, and shall be supplied to them on request. At the time of presenting the organization certificate the incorporators shall also submit proposed bylaws to the Board for its approval.

§ 1759. Membership

(a) In general

Subject to subsection (b) Federal credit union membership shall consist of the incorporators and such other persons and incorporated and unincorporated organizations, to the extent permitted by rules and regulations prescribed by the Board, as may be elected to membership and as such shall each, subscribe to at least one share of its stock and pay the initial installment thereon and a uniform entrance fee if required by the board of directors. Shares may be issued in joint tenancy with right of survivorship with any persons designated by the credit union member, but no joint tenant shall be permitted to vote, obtain loans, or hold office, unless he is within the field of membership and is a qualified member.

(b) Membership field

Subject to the other provisions of this section, the membership of any Federal credit union shall be limited to the membership described in one of the following categories:

(1) Single common-bond credit union

One group that has a common bond of occupation or association.

(2) Multiple common-bond credit union

More than one group –

(A) each of which has (within the group) a common bond of occupation or association; and

(B) the number of members, each of which (at the time the group is first included within the field of membership of a credit union described in this paragraph) does not exceed any numerical limitation applicable under subsection (d).

(3) Community credit union

Persons or organizations within a well-defined local community, neighborhood, or rural district. . . .

§ 1761. Management

(a) Board of directors, credit committee, and supervisory committee; election to board

The management of a Federal credit union shall be by a board of directors, a supervisory committee, and where the bylaws so provide, a credit committee. The board shall consist of an odd number of directors, at least five in number, to be elected annually by and from the members as the bylaws provide. Any vacancy occurring on the board shall be filled until the next annual election by appointment by the remainder of the directors.

(b) Membership on supervisory committee; names and addresses of officers and committee members

The supervisory committee shall be appointed by the board of directors and shall consist of not less than three members nor more than five members, one of whom may be a director other than the compensated officer of the board. A record of the names and addresses of the executive officers, members of the supervisory committee, credit committee, and loan officers, shall be filed with the Administration within ten days after their election or appointment.

(c) Compensation

No member of the board or of any other committee shall, as such, be compensated, except that reasonable health, accident, similar insurance protection, and the reimbursement of reasonable expenses incurred in the execution of the duties of the position shall not be considered compensation.

§ 1766. Powers of board.

(a) The Board may prescribe rules and regulations for the administration of this chapter (including, but not by way of limitation, the merger, consolidation, and dissolution of corporations organized under this chapter). . . .

(b)(1) The Board may suspend or revoke the charter of any Federal credit union, or place the same

in involuntary liquidation and appoint a liquidating agent therefor, upon its finding that the organization is bankrupt or insolvent, or has violated any of the provisions of its charter, its bylaws, this chapter, or any regulations issued thereunder. . . .

§ 1767. Fiscal agents and depositories; authorization to secure deposits by governmental bodies

(a) Each Federal credit union organized under this chapter, when requested by the Secretary of the Treasury, shall act as fiscal agent of the United States and shall perform such services as the Secretary of the Treasury may require in connection with the collection of taxes and other obligations due the United States and the lending, borrowing, and repayment of money by the United Sates, including the issue, sale, redemption, or repurchase of bonds, notes, Treasury certificates of indebtedness, or other obligations of the United States; and to facilitate such purposes the Board shall furnish to the Secretary of the Treasury from time to time the names and addresses of all Federal credit unions with such other available information concerning them as may be requested by the Secretary of the Treasury. Any Federal credit union organized under this chapter, when designated for that purpose by the Secretary of the Treasury, shall be a depository of public money, except receipts from customs, under such regulations as may be prescribed by the Secretary of the Treasury. . . .

§ 1768. Taxation

The Federal credit unions organized hereunder, their property, their franchises, capital, reserves, surpluses, and other funds, and their income shall be exempt from all taxation now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority; except that any real property and any tangible personal property of such Federal credit unions shall be subject to Federal, State, Territorial, and local taxation to the same extent as other similar property is taxed. Nothing herein contained shall prevent holdings in any Federal credit union organized hereunder from being included in the valuation of the personal property of the owners or holders thereof in assessing taxes imposed by authority of the State or political subdivision thereof in which the Federal credit union is located; but the duty or burden of collecting or enforcing the payment of such a tax shall not be imposed upon any such Federal credit union and the tax shall not exceed the rate of taxes imposed upon holdings in domestic credit unions.

The relevant provision of the Internal Revenue Code, 26 U.S.C. § 501, states in part:

§ 501. Exemption from tax on corporations, certain trusts, etc.

(a) Exemption from taxation. – An organization described in subsection (c) or (d) or section 401(a) shall be exempt from taxation under this subtitle

unless such exemption is denied under section 502 or 503.

. . . .

(c) List of exempt organizations. – The following organizations are referred to in subsection (a):

(1) Any corporation organized under Act of Congress which is an instrumentality of the United States but only if such corporation –

(A) is exempt from Federal income taxes –

(i) under such Act as amended and supplemented before July 18, 1984. . . .

The relevant provision of the Federal Tort Claims Act, 28 U.S.C. § 2674, states in part:

§ 2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages. . . .